STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION

In the Matter of	)	
	)	
Petition for Arbitration of XO ILLINOIS, INC. of an	)	
Amendment to an Interconnection Agreement with	)	**DOCKET NO. 04-0371**
SBC ILLINOIS INC. Pursuant to Section 252(b)	)	
of the Communications Act of 1934, as Amended	)	

REPLY TO XO'S RESPONSE TO SBC ILLINOIS' APPLICATION FOR REHEARING

Illinois Bell Telephone Company ("SBC Illinois" or the "Company"), by its attorneys, hereby submits its Reply to the Response of XO Illinois, Inc. ("XO") to its Application for Rehearing. For the reasons set forth below, XO's opposition should be rejected and SBC Illinois' Application for Rehearing should be granted.

I. THE COMMISSION SHOULD ELIMINATE FROM ITS ORDER ANY OBLIGATION TO PROVIDE UNES UNDER STATE LAW OR SECTION 271

Most points in SBC Illinois' Application are not addressed by XO at all. For example, XO does not deny that the Commission limited the scope of the proceeding to "incorporate changes necessitated by the *TRO*." ALJ's Ruling of June 3, 2004 at 7. Nor does XO deny that the state law obligations and Section 271 obligations the Commission addresses "pre-dated" the *TRO* by at least two years. Accordingly, the scope of the arbitration as established by the Commission itself should have precluded any ruling on state law or Section 271 obligations.

XO attempts to side-step this obstacle by alleging that SBC Illinois proposed to expand the scope of the arbitration by limiting UNE obligations to those set forth in Section 251(c) of the Act. XO Response at 2. While SBC Illinois disagrees with this assertion, it is completely beside the point. What SBC Illinois (or XO) *proposed* is irrelevant because the Commission limited the scope of this proceeding to changes of law caused by the *TRO* and

USTA II. Since neither the *TRO* nor *USTA II* changed state law or 271 unbundling obligations, neither should have been incorporated in the Amendment. SBC Illinois cannot, as XO suggests, waive the limitation on the scope of the docket that the Commission itself imposed.

In response to SBC Illinois' observation that the existing Agreement is completely silent as to any state law obligation to provide UNEs (and therefore should not now be changed to *include* them for the first time), XO cites to Section 19.2 of the ICA.[1] XO vastly overstates the legal effect of this language. This is not language that establishes *any* UNE-related obligations. Rather, it is a generic term in the General Terms and Conditions section of the Agreement that requires each party to act in a lawful manner and to observe all laws that apply to the conduct of its business affairs. It does not establish any unbundling obligations, any more than it would make XO liable to SBC Illinois for its failure to abide by local zoning ordinances. SBC Illinois reiterates the fact that *nowhere* does the current ICA require SBC Illinois to provide unbundled network elements under state law. The Order, therefore, cannot create such an obligation in this proceeding, especially when this proceeding is explicitly limited to incorporating changes contained in the *TRO* and is limited to amending the existing ICA rather than creating brand new obligations.

[1] Section 19.2 provides "Each Party shall comply at its own expense with all applicable federal, state, and local statutes, laws, rules, regulations, codes, final and nonappealable orders, decisions, injunctions, judgments, awards and decrees (collectively, **"Applicable Law"**) that relate to its obligations under this Agreement. Nothing in this Agreement shall be construed as requiring or permitting either Party to contravene any mandatory requirement of Applicable Law." See Docket No. 01-0681, Joint Petition For Approval of Interconnection Agreement Dated November 1, 2002.

II. THE ORDER DOES NOT CORRECTLY INCORPORATE THE REQUIREMENTS OF THE FCC'S STATUS QUO ORDER

A. THE "TRANSITION PERIOD" RULES HAVE NO LEGAL FORCE

In defense of the Order's decision to incorporate the FCC's proposed "Transition Period" requirements into the ICA, XO argues that the "nature of the transition plan . . . is far from clear." XO Response at 4. SBC Illinois fails to see what is so "unclear." As discussed in the Application for Rehearing (pp. 13-15), the *Status Quo Order* clearly distinguishes between the requirements adopted for the initial six month "Interim Period," which the FCC ordered "shall become effective immediately upon publication in the Federal Register" (*Status Quo Order* at 47), and the requirements *"propose[d]"* (but not yet adopted) for the second six month transition period. *Id*. at ¶ 29 (emphasis added). Any doubt as to the status of the proposed "transition period" was laid to rest by the FCC in its brief in opposition to the mandamus petition before the D.C. Circuit, in which the FCC expressly stated that its "transition period" proposal *"has no legal force whatsoever*." FCC Mandamus Br. at 8, n. 2 (emphasis added) (Attachment A to Application for Rehearing). There is no merit whatsoever to XO's suggestion that it is proper for the Commission to require parties to amend an ICA to incorporate FCC proposals that have "no legal force whatsoever."

B. THE ORDER IMPROPERLY PRESUMES THAT THE FCC WILL REQUIRE THE UNBUNDLING OF MASS MARKET SWITCHING, DEDICATED TRANSPORT AND ENTERPRISE LOOPS

For the reasons discussed in the Application for Rehearing, the Order (at 95-95) erred by holding that any modification to the ICA required to reflect the elimination of SBC Illinois' unbundling obligations with respect to mass market switching, dedicated transport and enterprise loops beyond the six month interim period adopted by the *Status Quo Order* must be addressed in a future change-of-law proceeding. Contrary to XO's assertions, there is nothing

"convoluted" about SBC Illinois' position and that position is fully consistent with the "changes in law that occurred during the arbitration." (XO Reply at 5, 3).

Simply stated, as a result of *USTA II*'s vacatur of the rules adopted in the *TRO* for the unbundling of mass market switching, dedicated transport and enterprise loops, there are no currently effective rules requiring the unbundling of those network elements under Section 251 of the 1996 Act. Thus, as the ALJ recognized, but for the *Status Quo Order*, it would have been necessary to include in this case "rulings based on the conclusion that ILECs do *not* have to offer [mass market] switching and [dedicated] transport." ALJ Memorandum To The Commission at 2 (Aug. 28, 2004) (emphasis in original). (For the reasons discussed in Section IV of the Application for Rehearing, this same conclusion applies to enterprise loops.) The *Status Quo Order* adopted interim requirements which require SBC Illinois to continue, for a limited time, to provide XO with unbundled access to these network elements "at the same rates, terms and conditions that applied under their interconnection agreement[ ] as of June 15, 2004 (the 'Interim Requirements')" while the FCC conducts a rulemaking to promulgate new rules to be consistent with *USTA II*. By their own terms, the Interim Requirements automatically expire on the "earlier of the effective date of final unbundling rules promulgated by the [FCC] or six months after Federal Register publication of this Order [i.e., March 13, 2005]."

Accordingly, any amendment to the ICA to properly incorporate the Interim Requirements must also provide that these requirements automatically expire on the earlier of the effective date of final unbundling rules promulgated by the FCC or March 13, 2005. If the FCC completes its rulemaking before March 13, 2005, and decides, based on a non-impairment finding, not to adopt rules requiring the unbundling of mass market switching, dedicated transport or enterprise loops, that will clearly *not* constitute a "change-of-law," because under the

current law, there are no rules in effect requiring the unbundling of those network elements under Section 251, and the Interim Requirements will have expired in accordance with *current* law, i.e., the terms of the *Status Quo Order*. Similarly, if the FCC does not complete its rulemaking before March 13, 2005, then the Interim Requirements will expire on that date under the terms of the *Status Quo Order*, and the absence of any unbundling requirement with respect to the *Status Quo Order* network elements at that time will not constitute a "change" in law but, rather, a necessary result of *current* law. In either scenario, SBC Illinois should not be required to institute another change-of-law proceeding to remove from the ICA the *Status Quo Order*'s interim unbundling requirements since, by the terms of that Order, those unbundling requirements will have automatically expired in accordance with the *current* law.

Addressing paragraph 22 of the *Status Quo Order*, XO argues that "far from *requiring* the Commission to presume the future inapplicability of certain UNEs, the FCC merely *did not prohibit* change of law proceedings from making such a presumption." XO Response at 6. XO misses the point completely. The purpose of paragraph 22 of the *Status Quo Order* is to make clear that ILECs are not prevented by the Interim Requirements from invoking their change-law-law rights to reflect *USTA II*'s elimination of the unbundling requirements in ICA amendments. Thus, as the FCC stated in its Mandamus Brief, "[u]nder the interim rules, however, *ILECs* are free to initiate 'change of law proceedings that presume the absence of unbundling requirements for switching enterprise loops and dedicated transport.'" App. For Rhg., App. A, FCC Mandamus Brief at 10 (emphasis added).

There is no basis for reading the *Status Quo Order*, as XO does, as allowing state commissions, in a change-of-law proceeding such as this one, to presume that the unbundling rules vacated by *USTA I* and *USTA II* will be resurrected. Such a reading of the *Status Quo*

Order is directly contrary to the FCC's intent, which was to obviate the need for even more contract modifications processes at the end of the interim period, and instead allow new contract requirements to "take effect quickly if our final rules in fact decline to require unbundling of the elements at issue, or if new unbundling rules are not in place by six months after Federal Register publication of this Order." *Id.* ¶ 23. This is the key aspect of the *Status Quo Order* on which the FCC expressly relied to defend the Interim Requirements as being " 'reasonably calculated' to further the implementation of the [*USTA II*] Court's mandate." FCC Mandamus Br. at 11. By holding that the expiration of the Interim Requirements must be addressed through future change-of- law processes, the Order contravenes the *USTA II* mandate, and the *Status Quo Order*, because it would effectively require that SBC Illinois continue for an indefinite period of time to provide XO with access to network elements for which there are no lawful unbundling rules.

III. THE ORDER INCORRECTLY CONCLUDES THAT THE *TRO*'S UNBUNDLING RULES FOR HIGH CAPACITY LOOPS WERE NOT VACATED BY *USTA II* – THEY WERE

For the reasons fully discussed in the Application for Rehearing (pp. 18-19), the Order is incorrect in concluding that *USTA II* did not vacate the *TRO*'s higher capacity, or "enterprise," loop unbundling rules. *Order* at 72, n. 53. XO argues that SBC Illinois' disagreement with this conclusion does not "merit reconsideration" because the conclusion is "academic" and "do[es] not affect the outcome of the arbitration or the language in the ICA Amendment that the parties must develop." XO Response at 7. Assuming that XO's characterization of the Order's conclusion on enterprise loops is correct, that is an additional reason to remove the conclusion from the Order. Commission orders, including those in arbitration proceedings, should not

include "academic" rulings on legal issues that are irrelevant the outcome of the proceeding, especially when those "academic" rulings are wrong.

In any event, however, SBC Illinois does not believe that the issue of whether *USTA II* vacated the *TRO* unbundling rules for enterprise loops is "academic." This issue goes hand-in-hand with the issue discussed above, i.e., whether it is proper to treat elimination of the *TRO*'s enterprise loop unbundling rules as a "change-of-law" in this proceeding (as SBC Illinois contends), or whether an ultimate decision by the FCC that the unbundling of enterprise loops should not be required will be treated as a future change-of-law event requiring SBC Illinois initiate a change-of-law process in the future (as the Order incorrectly holds). As discussed in the Application for Rehearing (p. 18), this issue should be resolved here in exactly the same way as the FCC resolved it, i.e., by assuming that *USTA II did* vacate the *TRO*'s enterprise loop unbundling rules and by presuming, in this change-of-law proceeding, the "absence of unbundling requirements . . . for enterprise loops." *Status Quo Order* at ¶ 1, n. 2; ¶ 23.

IV. THE ORDER'S CONCLUSIONS REGARDING THE COLLOCATION REQUIREMENTS FOR EELS SHOULD BE REVISED

Contrary to XO's assertion (Response at 8), SBC Illinois is not taking issue with the FCC's collocation requirement for new EELs, as identified in FCC Rule 51.318(c)(1). Rather, SBC Illinois' concern was that the Order (p. 72) did not clearly adopt the collocation requirement as stated in that rule.

SBC Illinois also took issue with the Order's suggestion that "it cannot alter any existing terms and conditions in the SBC/XO ICA pertaining to collocation." *Order* at 72. As SBC Illinois explained in its Application for Rehearing (pp. 20-21), the *TRO*'s EEL collocation requirements is one of the mandatory eligibility criteria for high capacity EELs set forth in FCC Rule 51.318 and upheld by *USTA II*, a fact which XO does not dispute. XO also does not dispute

that the amended ICA should incorporate all of the provisions of Rule 51.318, including the collocation requirement. Nevertheless, XO argues that SBC Illinois' argument on this matter should be rejected as "moot" because XO is not aware of any "inconsistency" between the parties' existing ICA and the *TRO*'s collocation requirement. If there is no such inconsistency, however, the Order's statement that any such inconsistency should be resolved against the *TRO* collocation requirements is improper dicta and should be removed for that reason in addition to the fact that it is wrong.

V. THE ORDER IMPROPERLY EXCLUDES CALL-RELATED DATABASES AND SS7 FROM THE LIST OF DECLASSIFIED UNES

XO concedes that in the *TRO* the FCC concluded that "call-related databases and SS7 signaling do not satisfy its impairment standards." XO Response at 9. In light of this, it should be clear that Call-Related Databases and SS7 signaling should be listed among the "declassified" UNEs in Section 1.3.1.1 of the Amendment. XO argues, however, that these UNEs should not appear on the list of "declassified" UNEs because they must be provided pursuant to state law. This is simply not true. The Commission has never determined that Call-Related Databases are subject to Section 13-801; it did not make any such determination in Docket 01-0614 or in the present arbitration proceeding. *See* SBC Illinois' Application, n. 12. As for Section 271, SBC Illinois has already demonstrated that any obligations under that provision are beyond the scope of this proceeding. Moreover, there is no need to address any Section 271 obligations because this proceeding is one to amend the existing agreement – not one to create new obligations.

Respectfully submitted,

ILLINOIS BELL TELEPHONE COMPANY

_____

One of Its Attorneys

Mark R. Ortlieb
Karl B. Anderson
SBC Illinois
225 West Randolph Street
Floor 25D
Chicago, IL 60606
(312) 727-2415
(312) 727-2928

Theodore A. Livingston
Dennis G. Friedman
Mayer Brown Rowe & Maw
190 South LaSalle Street
Chicago, IL 60603
(312) 701-7180
(312) 701-7319

CERTIFICATE OF SERVICE

I, Karl B. Anderson, an attorney, certify that a copy of the foregoing **REPLY TO XO'S RESPONSE TO SBC ILLINOIS' APPLICATION FOR REHEARING** was served on the parties on the attached service list by U.S. Mail and/or electronic transmission on October 21, 2004.

_____

Karl B. Anderson

SERVICE LIST FOR ICC DOCKET NO. 04-0371

David Gilbert
Administrative Law Judge
Illinois Commerce Commission
160 North LaSalle Street
Suite C-800
Chicago, IL 60601
dgilbert@icc.state.il.us

Dennis G. Friedman
Mayer Brown Rowe & Maw
190 South LaSalle Street
Chicago, IL 60603
dfriedman@mayerbrown.com

Matthew L. Harvey
Illinois Commerce Commission
160 North LaSalle Street
Suite C-800
Chicago, IL 60601-3104
mharvey@icc.state.il.us

Doug Kinkoph
XO Illinois, Inc.
Two Easton Oval
Suite 300
Columbus, OH 43219
doug.kinkoph@xo.com

Michael J. Lannon
160 North LaSalle Street
Suite C-800
Chicago, IL 60601
mlannon@icc.state.il.us

Qin Liu
Illinois Commerce Commission
527 East Capitol Avenue
Springfield, IL 62701
qliu@icc.state.il.us

Thomas Rowland
Stephen J. Moore
Kevin D. Rhoda
Rowland & Moore LLP
200 West Superior Street
Suite 400
Chicago, IL 60610
tom@telecomreg.com
steve@telecomreg.com
krhoda@telecomreg.com

Carol P. Pomponio
XO Illinois, Inc.
Concourse Level
303 East Wacker
Chicago, IL 60601
carol.pomponio@xo.com